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No. 789

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1966

FEDERAL TRADE COMMISSION, *Petitioner,*

v.

FRED MEYER, INC., ET AL.

**On Cross Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

## BRIEF FOR RESPONDENTS IN OPPOSITION TO CROSS PETITION

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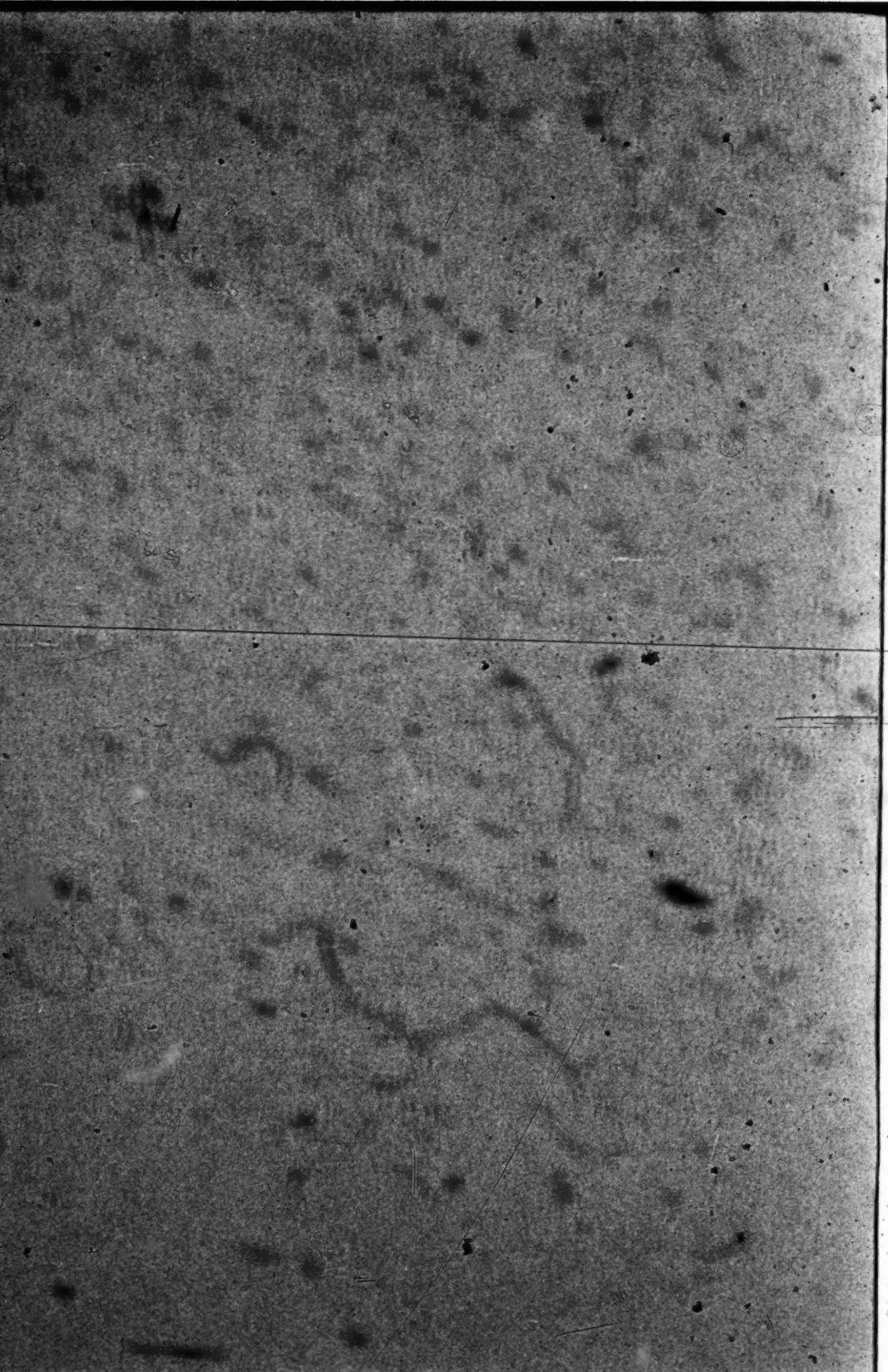

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This brief is filed on behalf of Fred Meyer, Inc., a corporation, and Fred G. Meyer and Earle A. Chiles, individually and as officers of said corporation, in opposition to the petition for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit filed by the Solicitor General on behalf of the Federal Trade Commission. While not designated as such, the petition is a cross petition to the petition filed by respondents in No. 703, this Term. The petition in No. 703 and the petition to which this opposing brief is filed (No. 789) seek review of separate aspects of a single judgment of the Ninth Circuit Court of Appeals entered on July 1, 1966.

The cross petition was filed on November 21, 1966. By order of the Clerk of this Court, the time for filing this brief in opposition was extended to January 18, 1967.

## QUESTIONS PRESENTED

1. Whether the court of appeals erred in holding that Section 2(d) of the Robinson-Patman Act does not require a supplier to grant proportionate promotional allowances to customers which operate at different and distinct functional levels of distribution and do not compete in the resale of such suppliers' products.

2. Whether it was error for the court of appeals to include in its order a recital of the statutory defenses to a charge of price discrimination when such defenses must be read into the order anyway, even if not specifically set forth.

## STATEMENT

The cross petition seeks review of that portion of the judgment of the court of appeals which reversed the Commission's holding that respondent, a retailer, violated Section 5 of the Federal Trade Commission Act by knowingly inducing promotional allowances of $350 from two of its suppliers which were not granted to two of those suppliers' wholesale customers.[1]

The Commission held that Section 2(d) of the Robinson-Patman Act requires that a supplier grant or make available on equal terms to its wholesale customers any promotional allowances it grants to direct-

[1] The cross petition also seeks review, conditionally, of the court of appeals' modification of the Commission's Section 2(f) order. The Court is asked to review the order question only if it grants review of the order question presented in the petition for a writ of certiorari filed by respondents in No. 703, this Term.

buying retail customers, where the customers to whom the wholesaler resells compete with the direct-buying retailer (R. 85-95). While conceding that the products of the suppliers granting the allowances had not been shown to have actually reached the shelves of the retailer-customers of the two wholesalers (R. 94), the Commission held that competition between respondent and the retailer-customers of the wholesalers in the resale of those products had nonetheless been established (R. 95).

In reversing, the court of appeals declined to interpret the "customers competing" language of Section 2(d) as embracing customers operating at different and distinct functional levels. In order to base a finding of a Section 2(d) violation on the granting of disproportionate allowances as between retailers and wholesalers, the court of appeals held, it must be shown (1) that the retail customers to whom the wholesaler resells are "indirect" customers of the supplier granting the allowance, i.e., that such supplier engages in a course of direct dealing with the wholesalers' customers, and (2) that those "indirect" customers in fact compete with the favored direct-buying retailer in the resale of the product involved (Pet., App. A, pp. 8a, 9a).

The court of appeals' reversal was based upon an evidentiary finding that the proof was insufficient to establish either of the two requisites; the record established no "indirect" customer relationship between the suppliers and the customers of the wholesalers; nor did it provide sufficient evidence to support a finding that the wholesalers' retail customers in fact competed with respondent in the resale of the suppliers' products (Pet., App. A, pp. 8a, 9a).

## ARGUMENT

1. The decision below, with which there is no conflict among the circuits, is correct and clearly consistent with accepted principles of statutory construction. Section 2(d) of the Robinson-Patman Act makes it unlawful for a supplier to grant promotional allowances to one customer unless the allowances are made "available on proportionally equal terms to all other customers competing in the distribution" of the supplier's products. The court of appeals held that for customers to be entitled to equivalent allowances under the statute, they must be in competition with each other in the resale of the products involved, and in order to be in competition with each other they must be at the same functional level.[2]

The Commission argues that the court of appeals' interpretation is contrary to Congressional purpose and that this Court's holding in *Federal Trade Commission* v. *Morton Salt Co.*, 334 U.S. 37 (1948), relating to Section 2(a) of the Act, is also applicable to Section 2(d). This is not so. By express language, Congress established a narrower concept of competition in 2(d) than it did in 2(a).

In 2(a), Congress prohibited price discrimination between purchasers where the effect may be to lessen or injure competition "with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them." It

[2] The Commission had agreed with this interpretation for 27 years' enforcement of the statute, until its decision in this case. See *Atalanta Trading Corp.*, 53 F.T.C. 565, 566, 572 (1956), *reversed on other grounds, Atalanta Trading Corp.* v. *Federal Trade Commission*, 258 F.2d 365 (2d Cir. 1958); *Liggett & Myers Tobacco Co., Inc.*, 56 F.T.C. 221, 250-253 (1959).

was this language which led the Court to hold in *Morton Salt* that the concept of competition in Section 2(a) is broad enough to prohibit a seller from selling to a retailer at a price lower than that charged a wholesaler whose customers compete with the retailer. *No such language appears in Section 2(d).*[3]

Where Congress, in the Robinson-Patman Act, intended to expand the applicable concept of competition beyond a particular distributional level, it did so in express terms, as in Section 2(a). *Federal Trade Commission* v. *Sun Oil Co.*, 371 U.S. 505, 514-15 (1963). The language and reasoning of this Court in *Sun Oil*, in construing the term "competitor" in the meeting competition proviso of Section 2(b) as meaning one competing only at the seller's level, is apposite (*Ibid.*):

> Thus, since Congress expressly demonstrated in the immediately preceding provision of the Act that it knew how to expand the applicable concept of competition beyond the sole level of the seller granting the discriminatory price, it is reasonable to conclude that like clarity of expression would be present in § 2(b) if the defense available thereunder were similarly intended to be broadly read to encompass, as is urged, the meeting of lower prices set not only by the offending seller's competitor, but also by the purchaser's competitor. There is no reason appearing on the face of the statute to assume that Congress intended to in-

[3] The Commission argues that the result in *Morton Salt* would have been the same even if Congress, while retaining its present description of price discrimination in 2(a), "i.e., 'discriminate in price between different purchasers', had made it a per se provision like Section 2(d) and thus omitted completely all reference to the three levels of competition at which injury can occur" (Pet. p. 12, n. 6; R. 90-91). But this is precisely what Congress did *not* do in 2(a).

voke by omission in § 2(b) the same broad meaning of competition or competitor which it explicitly provided by inclusion in § 2(a); the reasonable inference is quite the contrary.

Applying this reasoning, it is both logical and necessary, in accordance with principles of statutory construction, to conclude that the language "customers competing" in (2d) means what it says, namely, persons who are in competition with each other. Customers of a particular supplier who are not at the same functional level are *not* competing customers. Thus 2(d) includes only persons competing at the customers' level and does not embrace all persons who engage generally in the overall distribution function.[4]

Apart from the correctness of the decision and the absence of conflict among the circuits, the petition should be denied for two other reasons.

(a) The Commission's interpretation would quite obviously have far-reaching effects in many segments of our economy. We do not believe this Court should decide the issue without full and comprehensive assessment of these effects in a practical context. This, however, is not possible on the record of this case. The complaint did not raise the issue directly and, at the time evidence was taken, it appeared established that a 2(d) violation could not be based upon dispropor-

[4] Further support for this construction is found in the fact that under 2(a) a reasonable probability of competitive injury must clearly and definitely be shown. Congress, on the other hand, made 2(d) a *per se* section. Because of the nature of *per se* violations and the absence of opportunity for affirmative justification, together with the fact that the Commission is relieved of the burden of showing injury, it is illogical to assume that Congress meant by its silence to include, by way of construction of 2(d), something which it expressly included in 2(a), a non-*per se* section.

tionate payments as between retailers and wholesalers.[5] Accordingly, respondents made no attempt to present evidence going to the issue.

Several practical considerations argue against adoption of the Commission's interpretation. These considerations require some evidentiary basis for proper assessment. Would not the Commission's interpretation, instead of correcting an alleged competitive disadvantage, really result in a windfall to the wholesaler? How can the wholesaler be compelled to pass the promotional allowance on to its retail customers? Furthermore, are wholesalers desirous of obtaining allowances which require performance of an advertising function,[6] and would a wholesaler be receptive to a program which would require it to obtain assurance of performance, and perhaps supervise performance, by its retail customers? Alternatively, even assuming there could be some sort of legal resale price or allowance maintenance by which a supplier could compel a wholesaler to pass on the allowance to the latter's retail customers, would the wholesaler be receptive to a program under which the supplier exercises such control? Would this not seriously impair the independence of the wholesaler and his ability to establish his own terms of sale and course of dealing? How, as a

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[5] The complaint was issued on May 15, 1959 (R. 3-11). On September 9, 1959, the Commission, in its opinion in *Liggett & Myers Tobacco Co., Inc.*, 56 F.T.C. 221, 250-52 (1959), expressly declined to adopt the interpretation now proposed.

[6] While the record is far from sufficient on these practical issues, one wholesaler witness testified that his company "would not have been interested in an advertising allowance, as such, for our Wadham's brand" since it would demand "that we perform a function of advertising, which requires an expenditure of money" and "[n]one of our stores would have been interested in advertising the Wadham's grade of corn . . ." (R. 272-73).

practical matter, is the program to be administered? Is the wholesaler to be burdened with the task of maintaining the detailed records necessary to judge proportionality; and would any wholesaler be willing to assume this burden? In the normal situation the supplier does not even know the identity of many—if any—of its wholesalers' retail customers. How is the wholesaler to determine to which customers to pass on an allowance granted by a supplier when, as here (see R. 93-94), the supplier's products are commingled with products of other suppliers and there is no practicable means of determining which customers actually receive and resell a particular suppliers' product?

These and other practical problems should be considered on the basis of an evidentiary record before a definitive ruling on the issue presented by the Commission's petition is made.

(b) A further reason that the petition should be denied is that the basis of the court of appeals' reversal was, in part, evidentiary. Under either the Commission's theory that Section 2(d) requires proportionate treatment of wholesalers *whose customers compete with direct-buying retailers,* or the court of appeals' holding that 2(d) requires proportionate treatment of such customers of the wholesaler as are "indirect" customers of the supplier *which compete with direct-buying retailers,* the existence of actual competition in the suppliers' products at the retail level must be shown. The court of appeals, however, found that this prerequisite was not established by the evidence because it was not even shown that the products of the suppliers made their way to the shelves of the retailer-customers of the wholesalers. (Pet., App. A, pp. 8a, 9a). Being solely an evidentiary question,

we do not believe it is of any substantial importance to the enforcement of Section 2(d) or of any particular significance to any other case.

2. Nor is there any reason for this Court to review the second question presented. The court of appeals' inclusion in the Section 2(f) order of the statutory defenses to a price discrimination charge, in the words of the cross petition (Pet., pp. 14-15), merely makes "explicit what is implicit in every such order (*Federal Trade Commission* v. *Ruberoid,* 343 U.S. 470, 476)". The Commission's burden of proving a violation of the order in a penalty proceeding would, therefore, be exactly the same, whether the defenses are expressly recited in the order or not.

## CONCLUSION

For the foregoing reasons, the cross petition for a writ of certiorari should be denied.

Respectfully submitted,

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